

# Parental Detention and Deportation in Child Welfare Cases

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This article provides an analysis of themes that have emerged from 15 years of child welfare case law in which parental detention or deportation has been a factor. For example, the article reviews the connection between deportation and termination of parental rights, reasonable efforts for parents who have been detained or deported, the standard of living in another country as a factor in best interests analyses, and options for facilitating a detained or deported parent's participation in child welfare court proceedings. Certain rules emerge from this body of existing case law that provide guiding principles for child welfare agencies, caseworkers and courts as they try to address the range of situations where a parent's detention or deportation may have implications for child welfare proceedings.

Parental detention and deportation can create challenges in child welfare cases, but they do not fundamentally alter individuals' rights to parent their children and to engage in child welfare proceedings. To avoid significant appeals and delays in cases that involve parental deportation and detention, caseworkers, judges and attorneys can learn from existing case law on this topic throughout the country where state courts have already addressed these overlapping issues. This article provides an analysis of five themes that have emerged from 15 years of child welfare case law in which parental detention or deportation has been a factor. This body of case law paints a picture of certain rules and principles for child welfare agencies, caseworkers and courts to use as guidance as they try to address the range of situations where a parent's detention or deportation may have implications for current and future child welfare cases as well.

## **Parental Detention or Deportation in Child Welfare Proceedings**

Research on the impact of parental detention or deportation on child welfare cases and outcomes is limited. Data compiled in 2011 indicates that at that time approximately 5,100 children in foster care had parents who had been detained or deported. (Applied Research Center [ARC], 2011). To understand data on this topic more completely, in 2016 the U.S. Department of Health and Human Services issued a final rule for the Adoption and Foster Care Analysis and Reporting System (AFCARS) that included a requirement for state child welfare agencies to collect and report on cases involving parental immigration detention and deportation. (Office of the Federal Register, 2016). The final rule remains pending, however, based on recent implementation delays. As a result, data on this topic remains difficult to track and we are largely dependent on the 2011 estimates as the most specific information available when seeking to address questions about how frequently parental deportation and detention is a factor in child welfare proceedings.

What we do know is that of the roughly 70 million children under age 18 living in the United States, around 5.5 million live in families with at least one parent who lacks lawful status. (American Immigration Council, 2012). This means that approximately 8% of all children in the United States, or 1 in 13, face a risk that one of their parents could be deported. We also know that the percentage of children born to immigrant parents in this country has grown considerably over the last quarter century. Presently, about 18 million children (25% of the total child population) live with at least one immigrant parent in the United States (Migration Policy Institute, 2016). This represents an 11% increase between 1990 and 2016—or approximately 10 million more children with an immigrant parent than in 1990. Recent population studies have demonstrated that without this substantial growth in immigrant births the national birthrate would fall well below a stable replacement rate, indicating that this shift is likely to be a longer-term reflection of our nation's composition. (Myers, 2017).

Significantly for the purposes of this paper, during this same period when immigrant births have grown in this country, immigration enforcement laws and practices have expanded considerably and have had an increasing impact on families with children. The Department of Homeland Security estimated that between 1997 and 2007, more than 108,000 parents of U.S. citizen children were removed from the United States (American Immigration Council, 2012). More recently, data from Immigration and Customs Enforcement also shows that between 2011 and 2013 alone, roughly 500,000 U.S. citizen children experienced the apprehension, detention, and deportation of at least one parent (American Immigration Council, 2018). When looking at the simultaneous growth in the population of children born to immigrant parents and the impact of increased immigration enforcement on families, it is no surprise that there are increasing instances of child welfare cases that involve parental detention and deportation.

In the face of recent shifts in immigration enforcement practices, many communities have raised concerns about the risk that children will enter the child welfare system when a parent is detained even if

there are no underlying allegations of abuse or neglect. As the ARC data and many individual cases confirm, however, this is only one type of child welfare case that involves parental deportation and detention. (ARC, 2011). As a result, it is important to understand the challenges of these cases in a way that recognizes outside of any one political climate, there are many risks of intersection between child welfare and immigration enforcement.

### ***Circumstances Surrounding Parental Deportation or Detention in Child Welfare Cases***

Parental deportation or detention is most likely to affect child welfare proceedings in one of three ways. They are presented below.

#### ***Detention/Deportation Leads Directly to Foster Care***

There are cases in which a parent's detention or deportation leads directly to foster care placement because the child has suddenly been left without a caregiver (ARC, 2011). This may arise if immigration enforcement officers or other law enforcement personnel contact child protective services when taking a parent into custody. These instances often do not involve underlying allegations of abuse or neglect and are rooted instead in a need to find an immediate custodian for the child. As a result, child welfare involvement can be largely avoided in these instances by developing a contingency plan within the family to prepare for such situations and by ensuring the arresting officers provide an opportunity for parents to activate that plan by contacting back up caregivers (Immigration Legal Resource Center, 2017; Appleseed, 2017). For reference, see *In re Adoption of C.M.B.R.*, 332 S.W.3d 793 (Mo. 2011) (En Banc); *In re Adoption of C.M.*, 2013414 S.W. 3d 622 (Mo. Ct. App., October 7, 2013) (notably, this case did not involve placement of a child in foster care but does raise parallel analysis).

### ***Detention/Deportation of Parent Caregiver during Child Welfare Proceedings***

There are cases in which a child is already involved with the child welfare system based on allegations of abuse or neglect and parental detention or deportation occurs during the pendency of the child welfare case. In such instances, although the parent's detention or deportation may not have led to the child's involvement in the child welfare system, it inevitably introduces new challenges and hurdles for the case. (Women's Refugee Commission, 2010). Notably, in several of these cases—listed below—the child welfare proceeding could be considered to have led to the immigration action because child abuse allegations and investigations formed the basis of immigration authorities' involvement.

*Matter of Elias P.*, 145 A.D.3d 1066 (N.Y.S. Slip. Op. 08972 2016)

*In re B.S.O.*, 760 S.E.2d 59 (N.C. App. 2014)

*In re Interest of Angelica L.*, 767 N.W.2d 74 (Neb. 2009)

*In re Victoria L.*, 950 A.2d 1168 (R.I. 2008)

*In re B. & J.*, 756 N.W.2d 234 (Mich. Ct. App. 2008)

*In re Adrianna A.E.*, 745 N.W.2d 701 (Wis. Ct. App. 2007)

*In re Mainor T. and Estela T.*, 674 N.W. 2d 442 (Neb. 2004)

### ***Detention/Deportation of Non-Offending Parent during Child Welfare Proceedings***

There are cases in which a child is in foster care based on maltreatment allegations against one parent while the other parent is detained or has already been deported. In these instances, listed below, the detained or deported parent is not part of the home from which the child has been removed, and therefore the allegations of abuse or neglect do not pertain to that parent. Nevertheless, placement with this parent may be complicated by circumstances of detention or deportation.

*State of New Mexico ex rel. Children, Youth and Families Dep't v.*

*Alfonso*, 366 P.3d 282 (New Mex. App. 2015)

*In re Doe*, 281 P.3d 95 (Idaho 2012)

*In re E.N.C.*, et al, 384 S.W.3d 796 (Tex. 2010)

### ***Legal Community Responsibilities and Recommendations***

Some of the most common challenges that arise in child welfare cases involving detained or deported parents concern case plan compliance while abroad or in detention, strict reunification timelines under federal law, lack of access to services, and systemic bias about best interests and reunification across borders (Park, 2014). Scholarly articles examining the intersection of immigration and child welfare have noted that courts and child welfare agencies bear considerable responsibility in cases involving parental detention and deportation (Dettlaff, 2012). This is because although parental detention and deportation may complicate the case, these factors do not absolve the court or agency of its responsibilities to support reunification between children and parents when reunification with a parent is possible and appropriate (Park, 2014). Articles on this topic have also offered recommendations regarding how agencies, attorneys, and courts can work together to ensure children in immigrant families who become involved in the child welfare system can achieve positive outcomes despite additional hurdles (Cervantes & Lincroft, 2010). For example, states are encouraged to enact legislation to provide exceptions to the Adoption and Safe Families Act (ASFA) termination of parental rights timing provisions for cases that involve delays due to parental detention or deportation (Cervantes & Lincroft, 2010). Attorneys who represent detained or deported parents have also been encouraged to advocate for visitation and reasonable efforts based on ASFA provisions that apply equally to immigrant parents (Park, 2014). Attorneys, caseworkers, and courts are also encouraged to review the Immigration and Customs Enforcement (ICE) Parental Interests Directive, which seeks to address specific instances of intersection between child welfare and immigration enforcement.

## Summary

This article builds on existing recommendations by tracking how various state supreme and appellate courts have resolved some of these most common challenges in cases throughout the country over the last 15 years when handling child welfare cases involving parental detention and deportation. Although the decisions in each instance are lawfully binding only on other courts in the same state or jurisdiction, the aggregated themes provide useful information for caseworkers and courts that may confront similar fact patterns and legal questions in the future.

The article is organized around five primary themes that emerge from the case law: (1) Constitutional principles governing termination of parental rights for deported parents; (2) agency requirements to satisfy reasonable efforts in cases involving detained or deported parents; (3) limitations on using standard of living in another country as a basis for determining a child's best interests; (4) the relevance of detention or deportation in making abandonment findings; and (5) facilitating the participation in child welfare legal proceedings of parents who have been detained or deported.<sup>1</sup>

## Constitutional Principles Governing Termination of Parental Rights for Deported Parents

Under the U.S. Constitution, all parents have a right to make decisions concerning the care, custody and control of their children, regardless of immigration status. As the U.S. Supreme Court explained in *Troxel v. Granville*, 530 U.S. 57, 66 (2000), those rights derive from long-standing precedent and are only disrupted when a parent is found to be unfit. As with other Constitutional protections, parental rights extend to

<sup>1</sup> All case descriptions are provided in reverse chronological order. Additionally, each state court is referred to by the same name (either Supreme Court or Court of Appeals), though these may not be the formal court names. Similarly, for clarity and consistency, all child welfare agencies are referred to as simply "agency," parents are referred to as "mother" and "father," and children are referred to as "child."

all persons within the United States, including immigrants who lack lawful status. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). State Supreme Courts in Idaho, Texas, and Nebraska have all explicitly held that parents who lack immigration status in this country have the same constitutional interest in the care, custody, and control of their children as parents who are citizens, and that interest is not altered by detention or deportation.

### Case Examples

In 2012, the Idaho Supreme Court reversed a termination of parental rights (TPR) decision involving a father who had been deported to Mexico before his daughter's birth—*In re Doe*, 281 P.3d 95 (Idaho 2012). The child had been removed from her mother's care in the United States as an infant and no evidence had ever suggested the father was unfit as a parent. The court explained that under the U.S. Constitution, the father retained a fundamental liberty interest in maintaining a relationship with his child regardless of where he lived. The court also explained that although the child had been in foster care for slightly over two years, this was not through any fault of the father because he could not lawfully enter the country and had not been represented in child welfare proceedings though he had tried to be engaged in the case. The court concluded that the child should have been placed with the father in Mexico once it was determined that the mother was unable to successfully complete her case plan.

In 2010, the Texas Supreme Court concluded that a deported father had Constitutional rights to parent his children and those rights should not have been terminated absent a finding that the father had both committed an act prohibited by the State's TPR statute *and* that termination was in the children's best interests. *In re E.N.C.*, et al, 384 S.W.3d 796 (Tex. 2010). In that case, the father had been detained and deported several years before the children were removed from their mother's care based on allegations of abuse and neglect. The child welfare agency

had argued the father also endangered his children by engaging in conduct years earlier that created a risk of future deportation. The Texas Supreme Court rejected this basis for TPR and explained that finding child endangerment based on the risk of future deportation would cause countless immigrants to potentially lose their children and would violate their Constitutional rights to parent. The court also rejected the agency's best interests analysis because little evidence had been offered regarding the father as a placement option and the agency had not offered him a service plan or looked into the possibility of reunifying the children with him in Mexico even though evidence offered in the proceedings indicated he had a good relationship with his children and wanted to be engaged in case planning. As a result, the court ordered the agency to consider offering the father a service plan to assess the feasibility of his children moving to Mexico where he could assume custody of them.

The Nebraska Supreme Court has also held, on two occasions, that immigrant parents have Constitutional rights to parent their children and those rights are not disrupted by deportation: *In re Interest of Angelica L.*, 767 N.W.2d 74 (Neb. 2009) and *In re Mainor T. and Estela T.*, 674 N.W. 2d 442 (Neb. 2004). In the *Angelica* case, the Nebraska Supreme Court explained that a deported mother had a fundamental liberty interest in the care, custody, and control of her children because she had not been found unfit as a parent and she retained a right to raise her children in her own culture and with the children's siblings.

### **Agency Requirements to Satisfy Reasonable Efforts in Cases Involving Parents who have been Detained or Deported**

Absent aggravated circumstances and other statutory exceptions applicable to all child welfare cases, and until the child's permanency goal changes from reunification, agencies must provide reasonable efforts to reunify families and support parents seeking to remedy the conditions

that brought their children into the child welfare system regardless of parental detention or deportation.

### *Case Examples*

In 2016, the Connecticut Supreme Court addressed reasonable efforts in *In re Oreolurwa O.*, 139 A.3d 674 (Conn. 2016), a case in which a father resided in Nigeria and could not obtain a visa to visit and care for his infant son in the United States. Although this case did not involve detention or deportation, the reasonable efforts analysis regarding a parent residing in a foreign country is instructive. The court found the agency had failed to satisfy its obligation to make reasonable efforts to reunify the father and child by presuming that the father must be present in the United States to engage in reunification efforts and by presuming the child could not travel to Nigeria. The court explained that the agency should investigate possibilities for taking the child to Nigeria, including by looking into medical care available for him there.

In 2004, the Nebraska Supreme Court first addressed this issue in *In re Mainor T. and Estela T.*, 674 N.W. 2d 442 (Neb. 2004), a case involving a deported mother, in which the agency listed reunification as a permanency objective but stated reasonable efforts were not required because adoption could be pursued. The court rejected this assertion and explained that reasonable efforts *are* required in cases involving parents who have been deported, regardless of whether adoption may be an option. The court also explained that approval of reunification as a permanency objective without any means by which the mother could achieve that goal failed to meet the requirements of due process.

In a subsequent case in 2009, *In re Interest of Angelica L.*, 767 N.W.2d 74 (Neb. 2009), the Nebraska Supreme Court also held that reasonable efforts had not been provided where the mother never received a copy of her case plan because the caseworker read the contents over the phone through an interpreter. The mother also had difficulty complying because she could not have physical visits with her children and was also unable to reach them because the agency did not provide her with a telephone number to call and all contact had to be initiated by the foster parents.

The agency had told the mother that because it was difficult to arrange parenting classes abroad, it was her responsibility to figure it out and report back. The court concluded that these efforts were not reasonable.

The New Mexico appeals court addressed reasonable efforts in *State of New Mexico ex rel. Children, Youth and Families Dep't v. Alfonso*, 366 P.3d 282 (New Mex. App. 2015), a case involving a father who had been incarcerated in the United States and then deported. In that case, the children had entered foster care because of neglect allegations against the mother while the father was in criminal custody with an immigration hold. The agency sought to terminate a father's parental rights one month after he was deported. The New Mexico appeals court concluded that although the agency's neglect allegations were supportable, the agency had failed to provide reasonable efforts to help the father alleviate those issues and unjustifiably sought to terminate his parental rights. The court explained that the agency's reasonable efforts responsibilities do not disappear simply because the parent has been deported and lives in a foreign country.

In contrast with the string of state supreme and appeals court cases finding insufficient efforts, two state appeals court cases in New York and California have concluded that reasonable efforts were either sufficient or not necessary in cases involving parents who have been detained or who live in a foreign country. In the New York case, *Matter of Elias P.*, 145 A.D.3d 1066 (N.Y.S. Slip. Op. 08972 2016), the appeals court found that reasonable efforts had been met in a case before the father was detained and deported. In that case, the children entered foster care based on maltreatment allegations that arose before the father's detention. The agency filed the TPR petition one month after the father entered immigration detention. The court concluded that although the father complied with some components of the case plan he had not taken enough steps to plan for his children's future.

In the California case, *In re Y.M.*, 207 Cal.App.4th 892 (Cal. App. 2012), the appeals court decided the agency was not required to provide reasonable efforts to reunify the child with her mother in Guatemala. The court explained that the child, who had significant special needs, had been trafficked by family members and sexually abused in the United

States and it appeared the mother was involved in the scheme to traffic her for compensation. The child had also been physically abused while in Guatemala, and the mother told the caseworker that she wanted her daughter returned so that she could cook, clean, and help care for her younger siblings. The court concluded that repatriation of a foreign child who is a victim of human trafficking is not mandatory.

### **Limitations on Using Standard of Living in Another Country as a Basis for Determining a Child’s Best Interests**

When a parent lives abroad or may need to return to a foreign country, the agency has a responsibility to investigate reunification with that parent in his or her home country. Courts have made clear that in such instances, parental rights cannot be terminated based on finding a child might enjoy a more comfortable life in the United States. The standard of living in another country can at times be considered as part of a more complete best interest analysis, however, especially if there are other relevant factors surrounding child safety concerns.

#### ***Case Examples***

The Idaho Supreme Court addressed standard of living in 2012 in *In re Doe*, 281 P.3d 95 (Idaho 2012). In that case, although there were no allegations of abuse or neglect regarding the father who lived in Mexico, the child’s *guardian ad litem* suggested it was in the best interest of the infant “obviously to remain in the U.S. because there’s no comparison between being in Mexico and being in the U.S., being a U.S. citizen. She has all the luxuries or all the things we can offer.” The Idaho Supreme Court rejected this assessment and explained that although a child may enjoy a higher standard of living in this country that is not a basis for terminating the parental rights of a foreign national.

Similarly, in a Texas case, *In re E.N.C.*, et al, 384 S.W.3d 796 (Tex. 2010), the agency and court-appointed special advocate (CASA) had

argued that TPR was appropriate because the father lived in Mexico, had a new wife and family, and made too little money. The Texas Supreme Court reversed the TPR decision and explained that it is possible for a person's children to live with them following deportation. The court ordered the agency to offer the father a service plan to assess whether it would be feasible and appropriate for him to have custody of his children in Mexico. The Texas Court relied in part on looking at the Nebraska Supreme Court's parallel decision in *Angelica*, where it had explained that children's best interests are not determined by whether they would be "more comfortable" in the U.S. (*In re Interest of Angelica L.*, 767 N.W.2d 74 [Neb. 2009]). Rather, child welfare cases are governed by a "commanding presumption" that reuniting children with their parents is in their best interests no matter what country the parent lives in. In *Angelica*, the court had noted that the mother had a stable living situation in Guatemala, where she was 10 minutes walking distance from a hospital, had beds, bedding, food, pots, pans, running water, electricity and clothing for the children and there were at least three schools near her that the children could attend.

In 2015, the New Mexico appeals court examined standard of living in *State of New Mexico ex rel. Children, Youth and Families Dep't v. Alfonso*, 366 P.3d 282 (New Mex. App. 2015), a case where the agency had sought TPR in part because the father had been deported to Mexico and only spoke Spanish while his child's primary language was English. The child had originally entered foster care based on neglect allegations against the mother. The court explained that language disparities between a parent and child are not insurmountable obstacles to reunification, especially for an 18-month-old child. With respect to the child's other environmental factors, the court noted that although the child resided in a stable foster home in the United States, "a parent's rights may not be terminated simply because a child might be better off in a different environment."

There are instances, however, where courts have concluded that the environment in a parent's home country may run counter to the child's best interests. For example, in 2008, the Supreme Court of Rhode

Island upheld a TPR decision involving a mother who had previously lost rights to parent another child after he had been severely abused by his father in the home. The mother lacked lawful status in the United States, and a clinical psychologist testified that if the child were to move to Mexico with her mother she would not be safe in the region where the mother's family lived. The psychologist suggested TPR was appropriate because she questioned the mother's judgment to suggest Mexico as an option. The agency also expressed concerns that the child would not be well protected from the father who already had been deported to Mexico. The court therefore concluded, in *In re Victoria L.*, 950 A.2d 1168 (R.I. 2008), that the mother was an unfit mother and it was in the child's best interests to live in the United States and have her parents' rights terminated.

## **The Relevance of Detention or Deportation in Abandonment Findings**

Parental deportation does not constitute abandonment without additional evidence of a willful failure to act or an intentional withholding of care and affection.

### ***Case Examples***

In 2015, the New Mexico appeals court looked at abandonment in *State of New Mexico ex rel. Children, Youth and Families Dep't v. Alfonso*, 366 P.3d 282 (New Mex. App. 2015), a case involving a child who entered foster care based on allegations of neglect against his mother while his father was incarcerated and had an immigration hold. The agency filed a TPR petition one month after the father had been deported and asserted he had abandoned his child by failing to send gifts, financial support or more than one letter. The court rejected this argument and found termination for abandonment to be improper because the father expressed a legitimate desire to take responsibility for the child well in

advance of the termination proceedings and the facts supporting abandonment allegations were largely irrelevant as the child was an infant.

In a similar case in Idaho, *In re Doe*, 281 P.3d 95 (Idaho 2012), a father had already been deported by the time his daughter was born in the United States. She entered foster care based on allegations of abuse and neglect against her mother and stepfather. The trial court had concluded that her biological father abandoned her because he sent no letters or gifts to her, did not send financial support, and had not established a paternal relationship with her. The Idaho Supreme Court rejected this conclusion as “clearly erroneous” and explained that abandonment requires clear and convincing evidence that the parent has willfully failed to maintain a normal parental relationship with the child or willfully failed to do something that he had the ability to do in the first place. As applied in this case, the court noted the father was not able to come into the United States legally for 10 years following his deportation and therefore could not establish a physical relationship with her though he did regularly communicate with the caseworker. The court also explained that because the child had entered foster care when she was only seven months old, receiving letters from her father as an infant would not have established a relationship. With respect to financial support, the court reasoned that there was no evidence the father could have supported the child from abroad and therefore his failure was not willful.

Several state appeals courts have also examined claims of abandonment and have reached varying conclusions. For example, in 2014 (*In re B.S.O.*, 760 S.E.2d 59 [N.C. App. 2014]) the North Carolina Court of Appeals affirmed a finding that the father had abandoned his children when he was incarcerated for failure to have a license after they were already in foster care and then he was subsequently deported to Mexico. The court reasoned that while in Mexico he was in contact with the social worker on two occasions and spoke with his children and their mother only once but did not seek to have his children come live with him and did not offer any relative placement options. The court also

explained that the father had failed to provide child support from Mexico or after his return to the United States, even though he had no disabilities that would clearly preclude him from doing so. Taken together, the court concluded that these facts supported a finding that the father had willfully abandoned his children for at least six months preceding the filing of the TPR petition.

The Michigan Court of Appeals also examined this issue in 2008 in *In re B. & J.*, 756 N.W.2d 234 (Mich. Ct. App. 2008), a case involving two parents who had been detained and deported after their children entered foster care. The record showed that the caseworker had contacted Immigration and Customs Enforcement (ICE), thus causing the basis for the parents' deportation. The Court rejected the abandonment claim because evidence showed the parents were bonded with their children, and did not want to leave them behind when they were deported, but had no opportunity to take the children with them to Guatemala. The parents had continued to communicate with their counsel from abroad and had shown a clear ongoing interest in their children's lives. The court also concluded that the fact that they did not contact the agency from abroad was not an indication of abandonment because the caseworker had been the one who originally reported the parents to ICE—and so it was logical that they did not trust communication with her.

Another case that addressed abandonment in the context of termination of parental rights but did not involve foster care placement—*In re Adoption of C.M.B.R.*, 332 S.W.3d 793 (Mo. 2011) (En Banc); *In re Adoption of C.M.*, 2013414 S.W. 3d 622 (Mo. Ct. App., October 7, 2013)—created a great deal of controversy in Missouri between 2009 and 2014. In the *C.M.B.R.* case, a child was placed with kin and then a non-kin family after his mother was arrested in a worksite raid. The non-kin family sought to adopt the child, which was initially permitted but later overturned by the Missouri Supreme Court. The court concluded that the mother's parental rights had been violated by failing to provide procedural protections in the TPR process. On remand, the Missouri

Court of Appeals concluded, however, that the mother had neglected her child and her lack of attention to him during her period of immigration detention constituted sufficient grounds for upholding the original TPR. Because this case did not pass through a more traditional child welfare court system as a dependency case, it does not provide the same degree of useful precedent, but its complicated procedural and factual history does provide important context when examining the impact of parental deportation and detention in family law matters.

## **Facilitating the Participation of Parents who have been Detained or Deported in Child Welfare Legal Proceedings**

Because all parents have a fundamental liberty interest in the care, custody and management of their children, they have corresponding procedural due process protections such as a right to participate in hearings and to have legal counsel represent them. Although this can be more complicated to facilitate in cases involving parental detention or deportation, those factors do not nullify the parent's rights to participate in proceedings. Two cases analyzed below provide examples of the procedural protections courts and agencies have implemented in such instances.

### ***Case Examples***

The Wisconsin Court of Appeals addressed procedural protections in *In re Adrianna A.E.*, 745 N.W.2d 701 (Wis. Ct. App. 2007). This case involved a father who had been deported and whose due process rights were successfully met because he had an opportunity to meaningfully participate in the proceedings from abroad. The agency, *guardian ad litem*, and parent attorney all agreed on the importance of the father's participation in the proceedings and initially pursued many options to secure his physical presence in the courtroom. After these options

fell through because of visa denials, the agency agreed to use a webcam system that allowed him to participate during the four days of the trial. On one webcam, the father could hear the proceedings in the courtroom and listen to an interpreter. On another webcam, he could be seen and heard by the other participants. He also had the ability to text message privately with his attorney during the proceedings. In advance of the hearings, the agency had also provided the father and his attorney with summaries of each witness' expected testimony and copies of all exhibits to be used at trial. The appellate court concluded that unlike a simple telephone connection, this webcam approach offered a meaningful opportunity to participate in the proceedings because it allowed the father to assess the witnesses, communicate with his attorney in real time and hear everything happening in the proceedings.

By contrast, the Nebraska Supreme Court found procedural protections had not been provided sufficiently in *Mainor T. and Estela T.*, where the mother had been detained and deported during the pendency of the child welfare proceedings and never had an opportunity to be represented or heard in the child welfare legal proceedings. During the child welfare case, counsel was not appointed until 28 days after the adjudication hearing. That attorney never had contact with the mother during her incarceration or after her deportation, however, and withdrew from the case immediately prior to the termination hearing. The mother also had never been informed of her rights and had not had an opportunity to waive those rights. In this case, the court also expressly noted that when a parent has been actively working toward a reunification plan but immigration law has created additional obstacles, courts can consider (and agencies can support or seek) exceptions to the Adoption and Safe Families Act (ASFA) rule requiring agencies to seek TPR after a child has been in foster care for 15 out of the last 22 months. As the court explained, the timing rules in ASFA are intended to prevent foster care drift but in some cases those timelines directly conflict with the timing required for parents to complete their separate immigration proceedings or for

parents who have been deported to complete their case plans in their home country.

## Summary of Findings

Case law surrounding detention and deportation in child welfare cases offers critical guidelines and best practices for agencies and attorneys working with non-U.S. citizens involved in child welfare proceedings in the United States. First, all parents, including those who lack immigration status in this country have the same constitutional interest in the care, custody and control of their children. That constitutional interest is not altered by detention or deportation. Termination of parental rights requires findings of parental unfitness before a determination of best interests can be made. When there are no allegations of unfitness against a parent who has been detained or deported, termination of parental rights is not supported. Second, in child welfare cases, reasonable efforts need to match the requirements of a reunification plan so that the plan is feasible for the parent to complete. Such efforts require more than telling the parent the contents of a case plan, and may necessitate investigation into resources available for the family and children in another country, including medical care for the child if needed. Third, parental rights cannot be terminated because a child might enjoy a more comfortable life in the United States. When a parent lives abroad, the agency has a responsibility to investigate reunification with that parent in his or her home country. If there are other relevant factors surrounding safety concerns for the child in another country, those can be considered as part of the best interests analysis. Fourth, when evaluating claims of abandonment that involve detention or deportation, courts look at facts surrounding the parent-child relationship such as ongoing communication with the children, current caregiver, caseworker, counsel, or others, as well as financial contributions (when possible), efforts to prepare for the children in the home country, and intentional failure to act. Finally, procedural protections require methods for ensuring parental participation in child welfare proceedings that include an

opportunity to hear and understand testimony, respond to allegations, and communicate with counsel. Appointment of counsel to represent the parent in such proceedings is also a key factor to ensure compliance with procedural due process. In some instances, courts and agencies can seek to apply exceptions to procedural rules such as the ASFA timeline provisions if detention or deportation create delays that do not affect the underlying merits of a parent-child reunification goal.

## Conclusion

In sum, parental detention and deportation can create challenges in child welfare proceedings, but they do not fundamentally alter individuals' rights to parent their children and to engage in child welfare proceedings. To avoid significant appeals and delays in cases that involve parental deportation and detention, caseworkers, judges, and attorneys can learn from existing case law on this topic throughout the country where their peers have already addressed similar factual and legal issues.

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